

Read as it is written, this language renders the United States liable to all persons, including servicemen, injured by the negligence of Government employees. Other provisions of the Act set forth a number of exceptions, but none generally precludes FTCA suits brought by servicemen. One, in fact, excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," 2680(j) (emphasis added), demonstrating that Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for us to supplement - i. e., revise - that congressional disposition.

In our first encounter with an FTCA suit brought by a serviceman, we gave effect to the plain meaning of the statute. In *Brooks v. United States*, 337 U.S. 49 (1949), military personnel had been injured in a collision with an Army truck while off duty. We rejected the Government's argument that those injured while enlisted in the military can never recover under the FTCA. We noted that the Act gives the District Courts "jurisdiction over any claim founded on negligence brought against the United States" and found the Act's exceptions "too lengthy, specific, and close to the present problem" to permit an inference that, notwithstanding the literal language of the statute, Congress intended to bar all suits brought by servicemen. *Id.*, at 51. Particularly in light of the exceptions for claims arising out of combatant activities, 28 U.S.C. 2680(j), and in foreign countries, 2680(k), we said, "[i]t would be absurd to believe that Congress did not have the servicemen in mind" in passing the FTCA. 337 U.S., at 51. We therefore concluded that the plaintiffs in *Brooks* could sue under the Act. In dicta, however, we cautioned that an attempt by a serviceman to recover for injuries suffered "incident to . .

service" would [481 U.S. 681, 694] present "a wholly different case," *id.*, at 52, and that giving effect to the "literal language" of the FTCA in such a case might lead to results so "outlandish" that recovery could not be permitted, *id.*, at 53.

That "wholly different case" reached us one year later in *Feres*. We held that servicemen could not recover under the FTCA for injuries that "arise out of or are in the course of activity incident to service," 340 U.S., at 146, and gave three reasons for our holding. First, the parallel private liability required by the FTCA was absent. *Id.*, at 141-142. Second, Congress could not have intended that local tort law govern the "distinctively federal" relationship between the Government and enlisted personnel. *Id.*, at 142-144. Third, Congress could not have intended to make FTCA suits available to servicemen who have already received veterans' benefits to compensate for injuries suffered incident to service. *Id.*, at 144-145. Several years after *Feres* we thought of a fourth rationale: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline. *United States v. Brown*, 348 U.S. 110, 112 (1954).

In my view, none of these rationales justifies the result. Only the first of them, the "parallel private liability" argument, purports to be textually based, as follows: The United States is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674; since no "private individual" can raise an army, and since no State has consented to suits by members of its militia, 2674 shields the Government from liability in the *Feres* situation. 340 U.S., at 141-142. Under this reasoning, of course, many of the Act's exceptions are superfluous, since private individuals typically do not, for example, transmit

postal matter, 28 U.S.C. 2680(b), collect taxes or customs duties, 2680(c), impose quarantines, 2680(f), or regulate the monetary system, 2680(i). In any event, we subsequently recognized our error and rejected [481 U.S. 681, 695] *Feres*' "parallel private liability" rationale. See *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955).

Perhaps without that scant (and subsequently rejected) textual support, which could be pointed to as the embodiment of the legislative intent that its other two rationales speculated upon, the *Feres* Court would not as an original matter have reached the conclusion that it did. Be that as it may, the speculation outlived the textual support, and the *Feres* rule is now sustained only by three disembodied estimations of what Congress must (despite what it enacted) have intended. They are bad estimations at that. The first of them, *Feres*' second rationale, has barely escaped the fate of the "parallel private liability" argument, for though we have not yet acknowledged that it is erroneous we have described it as "no longer controlling." *United States v. Shearer*, 473 U.S. 52, 58, n. 4 (1985). The rationale runs as follows: Liability under the FTCA depends upon "the law of the place where the [negligent] act or omission occurred," 28 U.S.C. 1346(b); but Congress could not have intended local, and therefore geographically diverse, tort law to control important aspects of the "distinctively federal" relationship between the United States and enlisted personnel. 340 U.S., at 142-144. *Feres* itself was concerned primarily with the unfairness to the soldier of making his recovery turn upon where he was injured, a matter outside of his control. *Id.*, at 142-143. Subsequent cases, however, have stressed the military's need for uniformity in its governing standards. See, e. g., *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672

(1977). Regardless of how it is understood, this second rationale is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA.

The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform [481 U.S. 681, 696] recovery cannot possibly be worse than (what Feres provides) uniform nonrecovery. See *United States v. Muniz*, 374 U.S. 150, 162 (1963). We have abandoned this peculiar rule of solicitude in allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities. See *ibid.* There seems to me nothing "unfair" about a rule which says that, just as a serviceman injured by a negligent civilian must resort to state tort law, so must a serviceman injured by a negligent Government employee.

To the extent that the rationale rests upon the military's need for uniformity, it is equally unpersuasive. To begin with, that supposition of congressional intent is positively contradicted by the text. Several of the FTCA's exemptions show that Congress considered the uniformity problem, see, e. g., 28 U.S.C. 2680(b), 2680(i), 2680(k), yet it chose to retain sovereign immunity for only some claims affecting the military. 2680(j). Moreover, we have effectively disavowed this "uniformity" justification - and rendered its benefits to military planning illusory - by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting civilians to recover for injuries caused by military negligence. See, e. g., *Indian Towing Co. v. United States*, *supra*. Finally, it is difficult to explain why uniformity (assuming our rule were achieving it) is indispensable for the

military, but not for the many other federal departments and agencies that can be sued under the FTCA for the negligent performance of their "unique, nationwide function[s]," *Stencel Aero Engineering Corp. v. United States*, *supra*, at 675 (MARSHALL, J., dissenting), including, as we have noted, the federal prison system which may be sued under varying state laws by its inmates. See *United States v. Muniz*, *supra*. In sum, the second Feres rationale, regardless of how it is understood, is not a plausible estimation [481 U.S. 681, 697] of congressional intent, much less a justification for importing that estimation, unwritten, unwritten, into the statute.

Feres's third basis has similarly been denominated "no longer controlling." *United States v. Shearer*, *supra*, at 58, n. 4. Servicemen injured or killed in the line of duty are compensated under the Veterans' Benefits Act (VBA), 72 Stat. 1118, as amended, 38 U.S.C. 301 et seq. (1982 ed. and Supp. III), and the Feres Court thought it unlikely that Congress meant to permit additional recovery under the FTCA, 340 U.S., at 144 -145. Feres described the absence of any provision to adjust dual recoveries under the FTCA and VBA as "persuasive [evidence] that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Id.*, at 144. Since Feres we have in dicta characterized recovery under the VBA as "the sole remedy for service-connected injuries," *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980) (per curiam), and have said that the VBA "provides an upper limit of liability for the Government" for those injuries, *Stencel Aero Engineering Corp. v. United States*, *supra*, at 673.

The credibility of this rationale is undermined severely by the fact that both before and after Feres we permitted injured servicemen to bring FTCA suits, even though they had

been compensated under the VBA. In *Brooks v. United States*, 337 U.S. 49 (1949), we held that two servicemen injured off duty by a civilian Army employee could sue the Government. The fact that they had already received VBA benefits troubled us little. We pointed out that "nothing in the Tort Claims Act or the veterans' laws . . . provides for exclusiveness of remedy" and we refused to "call either remedy . . . exclusive . . . when Congress has not done so." *Id.*, at 53. We noted further that Congress had included three exclusivity provisions in the FTCA, 28 U.S.C. 2672, 2676, 2679, but had said nothing about servicemen plaintiffs, 337 U.S., at 53. We indicated, however, that VBA compensation [481 U.S. 681, 698] could be taken into account in adjusting recovery under the FTCA. *Id.*, at 53-54; see also *United States v. Brown*, 348 U.S., at 111, and n. That *Brooks* remained valid after *Feres* was made clear in *United States v. Brown*, *supra*, in which we stressed again that because "Congress had given no indication that it made the right to compensation [under the VBA] the veteran's exclusive remedy, . . . the receipt of disability payments . . . did not preclude recovery under the Tort Claims Act." *Id.*, at 113.

*Brooks* and *Brown* (neither of which has ever been expressly disapproved) plainly hold that the VBA is not an "exclusive" remedy which places an "upper limit" on the Government's liability. Because of *Feres* and today's decision, however, the VBA will in fact be exclusive for service-connected injuries, but not for others. Such a result can no more be reconciled with the text of the VBA than with that of the FTCA, since the VBA compensates servicemen without regard to whether their injuries occur "incident to service" as *Feres* defines that term. See 38 U.S.C. 105. Moreover, the VBA is not, as *Feres* assumed, identical to federal and state workers' compensation statutes in which exclusivity provisions almost invariably

appear. See, e. g., 5 U.S.C. 8116(c). Recovery is possible under workers' compensation statutes more often than under the VBA, and VBA benefits can be terminated more easily than can workers' compensation. See Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 Mich. L. Rev. 1099, 1106-1108 (1979). In sum, "the presence of an alternative compensation system [neither] explains [n]or justifies the Feres doctrine; it only makes the effect of the doctrine more palatable." Hunt v. United States, 204 U.S. App. D.C. 308, 326, 636 F.2d 580, 598 (1980).

The foregoing three rationales - the only ones actually relied upon in Feres - are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of "military discipline" rationale as the "best" explanation for that decision. [481 U.S. 681, 699] See United States v. Shearer, 473 U.S., at 57; Chappell v. Wallace, 462 U.S. 296, 299 (1983); United States v. Muniz, 374 U.S., at 162. Applying the FTCA as written would lead, we have reasoned, to absurd results, because if suits could be brought on the basis of alleged negligence towards a serviceman by other servicemen, military discipline would be undermined and civilian courts would be required to second-guess military decisionmaking. See Stencel Aero Engineering Corp. v. United States, 431 U.S., at 671 - 672, 673. (Today the Court goes further and suggests that permitting enlisted men and women to sue their Government on the basis of negligence towards them by any Government employee seriously undermines "duty and loyalty to one's service and to one's country." Ante, at 691.) I cannot deny the possibility that some suits brought by servicemen will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in

holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us.

It is strange that Congress' "obvious" intention to preclude Feres suits because of their effect on military discipline was discerned neither by the Feres Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of Feres suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed. See Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 St. Louis U. L. J. 383, 407-411 (1985). Or perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, 28 U.S.C. 2680(j); claims based upon performance of "discretionary" functions, 2680(a); claims [481 U.S. 681, 700] arising in foreign countries, 2680(k); intentional torts, 2680(h); and claims based upon the execution of a statute or regulation, 2680(a). Or perhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decisionmaking was unlikely to be affected greatly. Or perhaps - most fascinating of all to contemplate - Congress thought that barring recovery by servicemen might adversely affect military discipline. After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.

To the extent that reading the FTCA as it is written will require civilian courts to examine military decisionmaking

and thus influence military discipline, it is outlandish to consider that result "outlandish," *Brooks v. United States*, 337 U.S., at 53, since in fact it occurs frequently, even under the Feres dispensation. If Johnson's helicopter had crashed into a civilian's home, the homeowner could have brought an FTCA suit that would have invaded the sanctity of military decisionmaking no less than respondent's. If a soldier is injured not "incident to service," he can sue his Government regardless of whether the alleged negligence was military negligence. And if a soldier suffers service-connected injury because of the negligence of a civilian (such as the manufacturer of an airplane), he can sue that civilian, even if the civilian claims contributory negligence and subpoenas the serviceman's colleagues to testify against him.

In sum, neither the three original Feres reasons nor the post hoc rationalization of "military discipline" justifies our failure to apply the FTCA as written. Feres was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received. In re "Agent Orange" [481 U.S. 681, 701] Product Liability Litigation, 580 F. Supp. 1242, 1246 (EDNY), appeal dismissed, 745 F.2d 161 (CA2 1984).

## II

The Feres Court claimed its decision was necessary to make "the entire statutory system of remedies against the Government . . . a workable, consistent and equitable whole." 340 U.S., at 139. I am unable to find such beauty in what we have wrought. Consider the following hypothetical (similar to one presented by Judge Weinstein in *In re "Agent Orange" Product Liability Litigation*, supra, at 1252): A serviceman is told by his superior officer to deliver some papers to the local United States Courthouse. As he nears his destination, a wheel on his Government vehicle breaks, causing the vehicle to

injure him, his daughter (whose class happens to be touring the courthouse that day), and a United States marshal on duty. Under our case law and federal statutes, the serviceman may not sue the Government (Feres); the guard may not sue the Government (because of the exclusivity provision of the Federal Employees' Compensation Act (FECA), [481 U.S. 681, 702] 5 U.S.C. 8116); the daughter may not sue the Government for the loss of her father's companionship (Feres), but may sue the Government for her own injuries (FTCA). The serviceman and the guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father's companionship. The manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the Government in the daughter's suit (*United States v. Yellow Cab Co.*, 340 U.S. 543 (1951)) and in the guard's suit (*Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983)), even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may not implead the Government in the serviceman's suit (*Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977)), even though the serviceman was compensated under a statute that does not contain an exclusivity provision (VBA).

The point is not that all of these inconsistencies are attributable to Feres (though some of them assuredly are), but merely that bringing harmony to the law has hardly been the consequence of our ignoring what Congress wrote and imagining what it should have written. When confusion results from our applying the unambiguous text of a statute, it is at least a confusion validated by the free play of the democratic process, rather than what we have here: unauthorized rationalization gone wrong. We realized seven years too late that "[t]here is no justification for this Court to read

exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *Rayonier, Inc. v. United States*, 352 U.S., at 320 (footnote omitted).

I cannot take comfort, as the Court does, ante, at 686, and n. 6, from Congress' failure to amend the FTCA to overturn *Feres*. The unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA could hardly [481 U.S. 681, 703] have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946. And even if they could, intuiting those desires from congressional failure to act is an uncertain enterprise which takes as its starting point disregard of the checks and balances in the constitutional scheme of legislation designed to assure that not all desires of a majority of the Legislature find their way into law.

We have not been asked by respondent to overrule *Feres*, and so need not resolve whether considerations of stare decisis should induce us, despite the plain error of the case, to leave bad enough alone. As the majority acknowledges, however, "all of the cases decided by this Court under *Feres* have involved allegations of negligence on the part of members of the military." Ante, at 686. I would not extend *Feres* any further. I confess that the line between FTCA suits alleging military negligence and those alleging civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred. But that, I think, is justification enough.

Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and

recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today — limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not. I respectfully dissent.

In **United States v. Johnson**, Respondent Johnson did not ask this Court to overrule the **Feres Doctrine**. Petitioner now does.

The Court below dismissed Petitioner's Complaint on the basis *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Supreme Court created an 'incident to service' exception to the FTCA wherein the federal government is not liable under the FTCA for injuries to servicemen arising out of or in the course of activity incident to service. *Id.* at 146. The *Feres* court did not, however, define which activities fall within the purview of 'incident to service'.

While subsequent case law has yet to dispositively set forth what *exactly* constitutes activity 'incident to service', myriad case law exists expanding *Feres* to effectively prohibit any suit by any serviceman, regardless of the circumstances. *See, e.g., Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988) (dismissing a claim for negligent prenatal care); *Mackey v. United States*, 226 F.3d 773 (6th Cir. 2000) (applying *Feres* to intentional torts). *See also Kitowski v. United States*, 931 F.2d 1526 (11th Cir. 1991).

However, inasmuch as *Feres* and its progeny purport to interpret the FTCA as it relates to claims by servicemen, the

FTCA itself already specifically speaks to an exception for servicemen as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to...

(j) any claim *arising out of the combatant activities of the military or naval forces*, or the Coast Guard, during time of war.

28 U.S.C. 2680(j). (Emphasis added). Thus, under the FTCA, had Jeremy been killed while serving in the present conflict in Iraq, his father clearly would have been barred from filing suit. However, the circumstances of the instant case do not fall within the *sole* exception to the FTCA articulated by Congress.

The Constitution explicitly confers upon Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8, cl. 14. *See also United States v. Stanley*, 483 U.S. 669, 679 (1987), citing *Chappell v. Wallace*, 462 U.S. 296 (1983). Implicit in this power is the "plenary control over the rights, duties, and responsibilities in the framework of the military establishment." *Chappell, supra* at 301. Thus, although the judiciary is vested with the power to interpret statutes relating to the armed forces, it cannot create legislation, as that power is solely vested in Congress.

When Congress enacted the FTCA, it provided specific exceptions to filing suit against the government, such as the prohibition of suits related to injuries sustained in combat described above. 28 U.S.C. §2680. In promulgating its decision, the *Feres* court added its own exception to the statute without Congressional approval or the Constitutional authority

to do so. While *Feres* and its progeny endeavor to "interpret", rather than add an exception to the FTCA, the well-known rules of statutory construction show this assertion to be incorrect.

The Supreme Court has consistently recognized the rule of *expressio unius est exclusio alterius*, i.e., the mention of one implies the exclusion of the other, which is applied where the items expressed are, "members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), quoting *United States v. Van*, 535 U.S. 55, 65 (2002). See also *Chevron USA, Inc v. Echazabal*, 536 U.S. 73 (2002).

Applying this well established rule of statutory construction to the FTCA plainly demonstrates that the *Feres* decision represents inappropriate judicial legislation. Such was recognized by Justice Scalia in his dissent in *United States v. Johnson*, 481 U.S. 681 (1987), where he stated:

"The problem now...is that Congress not only failed to provide such an exemption, but plainly excluded it....[R]ead as it is written, this [FTCA] language renders the United States liable to all persons, including servicemen, injured by the negligence of Government employees. Other provisions of the Act set forth a number of exceptions, but none generally precludes FTCA suits brought by servicemen....There was no proper basis for us to supplement—i.e., revise – that congressional disposition." *Johnson, supra* at 692-693.

Moreover, the Supreme Court has specifically recognized that, "There is no justification for courts to read exemptions into Federal Tort Claims Act beyond those provided by Congress, and if the Act is to be altered that is a function for the same body that created it." *United States v. Muniz*, 374 U.S. 150 (1963), citing *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957).

In *Muniz*, the Court determined that the FTCA entitled prisoners to recover for torts committed against them by federal employees. *Id.* The rationale for the decision was that because the FTCA did not explicitly preclude suits by prisoners, the Court could not interpolate such. *Id.* Yet that is exactly what has happened in the instant case, as the FTCA only precludes suit by a serviceperson where that injury is sustained pursuant to combatant activity.

The practical effect of *Muniz* is to allow criminals to recover for torts committed against them, while that of *Feres* is to deprive the men and women who voluntarily sacrifice for the sake of the government of those same rights. Outrageously, had terrorist and killer Timothy McVeigh been similarly injured or killed at the hands of prison officials, a wholly different outcome would have ensued in the lower court. Specifically, had McVeigh while in federal prison while awaiting execution, been negligently killed by prison officials his family would arguably have subject matter jurisdiction to bring a claim under the FTCA and *Muniz*. Yet, under the judicially created *Feres* doctrine, American servicemen and women are not afforded those same rights. Clearly, the only lawful and logical conclusion is that *Feres* was wrongly decided, and must not be applied to any case, let alone the case at hand.

## **The Rationales Supporting Application of *Feres* Does Not Justify a Judicially-Created Exception to the FTCA.**

As discussed above, *Feres* represents judicial legislation, and as such, is per se unconstitutional. Assuming, *arguendo*, that the *Feres* court had the authority to create or expand legislation, it did not have persuasive rationale to do such.

*Feres* interpreted the FTCA to exclude all claims sustained 'incident to service' based on three policy considerations, including 1) the "distinctly federal" character of the relationship between the government and members of the armed forces, 2) lack of parallel private liability, and 3) the belief that Congress could not have intended to permit suits by servicemen because they could already receive statutory disability and death benefits. *Feres, supra* at 141-145. Later, a fourth "military discipline" rationale was added: "if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *US v. Shearer*, 473 US 52, 59 (1985). *See also US v Brown*, 348 US 110, 112 (1954).

However, as Justice Scalia noted in *Johnson*,

The foregoing three rationales—the ones actually relied upon in *Feres*—are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of "military discipline" rationale as the "best" explanation for the decision. *Id.* at 698 (Scalia, J., dissenting).

Moreover, Justice Scalia eloquently surmised,

In sum, neither the three original *Feres* reasons nor the post hoc rationalization of "military discipline" justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received. *Id.* at 700, citing *In Re "Agent Orange" Product Liability Litigation*, 580 F Supp 1242, 1246 (EDNY), appeal dismissed 745 F2d 161 (2d Cir. 1984).

As Justice Scalia articulated, the rationales underlying *Feres* do not justify the derivation from the plain language of the FTCA. Otherwise stated, whatever the reasons the *Feres* court had for promulgating its ruling, it does not comport with the plain language of the statute. As only Congress has the power to legislate, the sole basis for dismissal of this claim does not pass Constitutional muster, and as such, was inappropriately applied to the instant case.

### REASONS FOR GRANTING THE WRIT

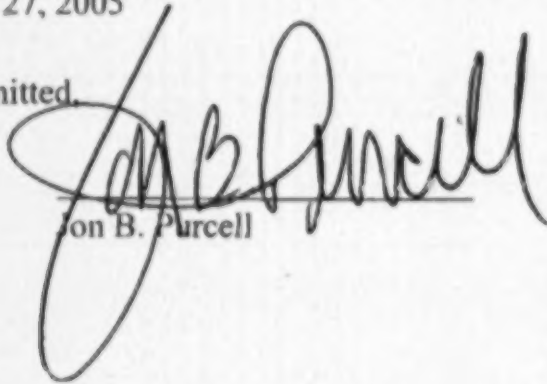
Petitioner argues that not all injuries and deaths that occur in the military during training are, or should be, actionable. However, there are those few cases that involve such a degree of negligence, and where the conduct is so outrageous, that the cloak of immunity is simply lost. Yet, when they happen, the *Feres* Doctrine raises its ugly head and those who are responsible simply step behind it and smile knowing that all the legal minds of the military and the Federal Government will marshal against those who would dare to challenge them.

## CONCLUSION

Feres v. United States, 340 U.S. 135 (1950) needs to be overturned and Petitioner urges this Court to issue a writ of certiorari in order to do just that.

Dated: September 27, 2005

Respectfully Submitted,



Jon B. Purcell

# APPENDICES

United States Court of Appeals

FOR THE TENTH CIRCUIT

Filed June 28, 2005

No. 04-4309 (D.C. No. 04-CV-256-DS)(D. Utah)

Jon B. Purcell, Personal Representative  
of the Estate of Jeremy Ross Purcell,  
Plaintiff - Appellant,

v.

United States of America,  
Defendant - Appellee

and

John Does 1 through 100,  
Defendants.

ORDER AND JUDGMENT<sup>1</sup>

Before: HARTZ, McKAY, and PORFILIO, Circuit Judges

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<sup>1</sup>This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10<sup>th</sup> Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination this appeal. See Fed. R. App. P. 34(a)(2); 10<sup>th</sup> Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Jon B. Purcell, as personal representative of the estate of his son, Jeremy Ross Purcell, appeals from a district court order dismissing his claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, as barred by the doctrine of *Feres v. United States*, 340 US 135 (1950). We review the order de novo, *Ricks v. Nickels*, 295 F.3d 1124, 1127 (10<sup>th</sup> Cir. 2002), and affirm for the reasons explained below.

Jeremy Purcell, a member of the United States Marine Corps, was killed in an accident during a military training operation at Camp Pendleton, California. He was fatally wounded when a participant mistakenly used live ammunition for the blanks that were intended for the exercise. Plaintiff filed this action seeking redress for the alleged negligence of not only the particular participant using the live ammunition but also the Marine Corps for relying on individual marines to segregate, store, account for, and use the live and blank ammunition issued to them. The United States was substituted as a defendant pursuant to 28 U.S.C. § 2679(d)(1), and moved for dismissal order under *Feres*, arguing that Jeremy's death "ar[ose] out of or [was] in the course of activity incident to service" and, thus, was not redressible. *Feres*, 340 U.S. at 146. See generally *Tootle v. USDB Commandant*, 390 F.3d 1280, 1281-82 (10<sup>th</sup> Cir. 2004) and cases cited therein.

The District court agreed and dismissed the FTCA claim against the United States for lack of subject matter jurisdiction. Following dismissal of the rest of the case and entry of judgment, plaintiff appealed the FTCA ruling.

Recent Decisions have made it clear that the overarching question under *Feres* is whether the plaintiff's injury was "incident to service," regardless of the presence of any "special factors" potentially implicating or undermining the legal rationales historically advanced for the doctrine. See Tootle, 390 F.3d at 1282 ("Rather than focusing on the presence or absence of the *Feres* rationales, then, the relevant question is whether [plaintiff's] alleged injuries arose incident to service." (quotation omitted)); Ricks, 295 F.3d at 1130 (noting relevant case law has "effectively merged the "special factors" analysis with the incident to service test"). The incident-to-service inquiry "has broadened ... to the point where it now encompasses, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military." Ricks, 295 F.3d at 1128 (quoting *Pringle v. United States*, 208 F.3d 1220, 1223-24 (10<sup>th</sup> Cir. 2000) (further quotations omitted). The accident at issue here, occurring in the course of military training exercises, clearly falls within the scope of the doctrine. See e.g., *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1492 (10<sup>th</sup> Cir. 1983); *Kitowski v. United States*, 931 F.2d 1526, 1530 (11<sup>th</sup> Cir. 1991); *Estate of Matinelli v. United States*, 812 F.2d 872, 873 (3d Cir. 1987).

Plaintiff sought to avoid that conclusion by advancing two distinct lines of argument. First, he insisted that the *Feres* doctrine be qualified in the same way that the intentional-tort

exclusion of 28 U.S.C. § 2680(h) was in *Sheridan v. United States*, 487 U.S. 392 (1988), which allowed an FTCA claim even though the immediate cause of injury was an assault excluded by § 2680(h), because behind the immediate cause lay another proximate cause - supervisory negligence enabling the assault - not subject to the exclusion. See R. docs. 10 & 18. Second, plaintiff argued for abandonment of the doctrine, for reasons expressed by the dissent in *United States v. Johnson*, 481 U.S. 681, 692-703 (1987), as an unjustified judicial encroachment on the exclusive sphere of Congress, which did not include an incident-to-service principle among the list of exclusions in the FTCA. See R. docs. 1 & 18.

The district court rejected the first argument, holding *Sheridan's* analysis of the intentional-tort exclusion inapposite to *Feres'* incident-to-service principle and noting that similar allegations of negligent military management leading to a service-related injury did not forestall application of the *Feres* doctrine in *United States v. Shearer*, 473 U.S. 52, 57-59 (1985). See R. doc. 21 at 3-4. We agree that *Sheridan* does not solve the *feres* problem in this case. *Sheridan* turned on two joint points: (1) a given injury may be traced back to more than one type of tortious conduct, and (2) the exclusions in §2680 are tort-specific, so that the exclusion of one type of tort claim need not entail the exclusion of another. But the second point does not apply here.

The *Feres* doctrine turns on the relationship of the plaintiff's injury to his or her military service, not the specific tort theory asserted to redress the injury. If it applies, it excepts the federal government from any liability "under the

FTCA.”<sup>2</sup> Ricks, 295 F.2d 1127 (emphasis added); See Tootle, 390 F.3d at 1281; Pringle, 208 F.3d at 1223; see also Bowne v. Oistead, 125 F.3d 800, 804 (9<sup>th</sup> Cir. 1997) (“Feres bars intentional tort claims as well as simple negligence claims”); Mackey v. United States, 226 F.3d 773, 776 (6<sup>th</sup> Cir. 2000) (holding to same effect, collecting cases). Thus there is no significance under Feres to the fact that a tort claim based on the negligence of the marine using live ammunition here may be augmented with another tort claim based on the military policy making that mistake possible: the latter claim, being equally “incident to service,” is precluded for the same reason as the former.

Plaintiff’s argument for the abandonment of the Feres doctrine is misdirected at this court. “[O]nly the United State Supreme Court can overrule or modify Feres.” Labash v. United States Dept of Army, 668 F.2d 1153, 1156 (10<sup>th</sup> Cir. 1982). For the same reason, plaintiff’s related constitutional challenge to the FTCA as construed in Feres is beyond our purview. See Tootle, 390 F.3d at 1282-83 (noting but not reaching constitutional concerns raised regarding Feres doctrine because panel was “bound to follow the decisions of the Supreme Court and the published decisions of this court”). We are constrained by controlling precedent to hold that the FTCA affords no remedy to those who, like plaintiff, have suffered even grievous personal loss incident to service in this

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<sup>2</sup> Feres also applies to constitutional claims. Tootle, 390 F.3d at 1282-83; Bowen, 125 F.3d at 803 & n.2. We need not pursue the point further, however, as plaintiff has limited the appellate briefing to application of Feres to FTCA claims.

country's military forces.

The judgment of the district court is **AFFIRMED**.  
Plaintiff's motion for leave to proceed on appeal in forma  
pauperis (IFP) is **DENIED**.<sup>3</sup>

Entered for the Court

John C. Porfilio  
Circuit Judge

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<sup>3</sup> Given plaintiff's financial declaration reflecting yearly income in excess of \$45,000 and net assets over \$45,000, he cannot qualify for waiver of fees and costs under the indigency standard governing IFP status under 28 U.S.C. §1915. See e.g., *Walker v. People Express Airlines, Inc.*, 886 F.2d 598, 601-02 (3d Cir.1989); *Sears, Roebuck & Co. v. Charles W. Sears Real Estate, Inc.*, 865 F.2d 22, 23 (2d Cir. 1988); *United States v. Valdes*, 300 F.Supp.2d 82, 84 (D.DC 2004)

The United States District Court For the District of Utah

CENTRAL DIVISION

Filed August 27, 2004

No. 04-CV-256-DS

Jon B. Purcell, Personal Representative  
of the Estate of Jeremy Ross Purcell, Deceased  
Plaintiff

v.

United States of America,  
Defendant,  
and  
John Does 1 through 100,  
Defendants.

ORDER ADDRESSING MOTION TO DISMISS CLAIM  
PURSUANT TO FEDERAL TORT CLAIMS ACT

I.

INTRODUCTION

Defendant United States of America has moved the Court pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss the plaintiffs claim brought under the Federal Tort Claims Act (the "FTCA") for lack of subject matter jurisdiction. The United States does not dispute the factual allegations set out in the complaint, but argues as a matter of law that this Court lacks jurisdiction over the FTCA claim.

For purposes of this motion, the Court accepts the plaintiff's factual allegations as true. Jeremy Ross Purcell (PFC Purcell) was enlisted in the United States Marine Corp. On August 28, 2002, PFC Purcell was assisting in some pre-deployment training at Camp Pendleton, California; the training included a "force-on-force" training operation. The Marines involved in this training operation were instructed to use blank, rather than live, ammunition. However, one member of the training operation mistakenly used live ammunition instead. PFC Purcell was shot in the chest four times with live ammunition, and died as a result of these wounds.

The Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950), and subsequent cases, has held that the FTCA does not waive sovereign immunity for a claim for injuries suffered in the course of activity incident to military service. Therefore the United States argues that the FTCA claim should be dismissed with prejudice, and that they should no longer be a defendant in this case.

## II.

### THIS COURT HAS NO DISCRETION TO REJECT THE *FERES* DOCTRINE.

The plaintiff acknowledges the holding of the *Feres* court, that the United States is not liable for injuries to servicemen "where their injuries arise out of or are in the course of activity incident to service." *Feres*, at 146. He also acknowledges that PFC Purcell's death occurred incident to his military service. However, he urges this Court to "exercise its considerable judgment and limit the scope of this doctrine, if not reject it in

its entirety, and not apply it to the instant case." As compelling as the allegations are in this case, this court does not have the discretion to reject the *Feres* doctrine. Only the Supreme Court can overrule *Feres*. "[I]t is [the Supreme Court's] prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

### III.

#### *FERES* DOCTRINE BARS PLAINTIFF'S CLAIM NO MATTER HOW IT IS FRAMED.

The plaintiff argues that because of the United States Marine Corps' "flawed, foreseeably dangerous, and life-threatening policy of allowing live ammunition to be kept with blank ammunition," the government should be held liable for "negligently allowing an assault to occur." The plaintiff relies heavily on *Sheridan v. United States*, 487 U.S. 392 (1988). However, that case is factually distinguishable from the present case. The plaintiffs in *Sheridan* were civilians who were injured by an intoxicated off-duty serviceman. Because they were not injured incident to their military service, the *Feres* doctrine was not applied. This court needs not consider whether the *Sheridan* "assault and battery" exception to the FTCA's waiver of sovereign immunity applies here, because *Feres* clearly states that the FTCA in its entirety does not apply to servicemen injured in the course of their military service. "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*, at 146. "[T]he *Feres* doctrine has been applied consistently to bar all suits on behalf of service

members against the Government based upon service-related injuries." *Shaw v. United States*, 854 F .2d 360, 361 62 (10th Cir. 1988).

The plaintiff in *United States v. Shearer*, 473 U.S. 52 (1985), like the plaintiff in this case, tried to avoid *Feres* by focusing only on the negligence claim and by framing her claim as a "straightforward personnel decision." In *Shearer* a serviceman was kidnaped and murdered by another serviceman, and the plaintiff argued that the Army knew the other serviceman was dangerous and negligently failed to exercise control of him or to warn others that he was at large. The Court held that whatever the claim is called, it still deals with a decision of command. The Court reasoned that, "to permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions." *Id.*, at 52.

The United States Supreme Court has repeatedly refused to allow cases that would require a civilian court to second-guess military decisions. *See, Id.*, at 52; *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) (*Feres* doctrine bars suit where "[t]he trial would. .involve second-guessing military orders, and would require members of the armed services to testify in court as to each other's decisions and actions.") Applying the rationale of *Shearer* and other cases, this Court holds that the FICA does not waive sovereign immunity in the present case to allow Plaintiff to recover for any negligence in failing to prevent his son's injury and death.

IV.  
CONCLUSION

The death of Jeremy Purcell is indeed a tragedy. However, for the reasons stated above the Court grants Defendant's motion to dismiss Plaintiff's claim brought under the Federal Tort Claims Act for lack of subject matter jurisdiction, and dismisses the United States as a defendant in this action.

SO ORDERED.

DATED this 26<sup>th</sup> day of August, 2004

BY THE COURT

DAVID SAM  
SENIOR JUDGE  
U.S. DISTRICT COURT

The United States District Court For the District of Utah

CENTRAL DIVISION

Filed August 27, 2004

No. 04-CV-256-DS

Jon B. Purcell, Personal Representative  
of the Estate of Jeremy Ross Purcell, Deceased  
Plaintiff

v.

United States of America,  
Defendant,  
and  
John Does 1 through 100,  
Defendants.

ORDER ADDRESSING MOTION TO DISMISS CLAIMS  
AGAINST UNNAMED INDIVIDUAL DEFENDANTS

The Court, having considered the defendant's Motion to Dismiss Claims against Unnamed Individual Defendants, there being no timely response, and for good cause appearing, hereby grants the defendant's motion for the reasons set forth in Defendant's memorandum in support of the motion.

SO ORDERED.

DATED this 1st day of September, 2004

BY THE COURT

DAVID SAM  
SENIOR JUDGE  
U.S. DISTRICT COURT

The United States District Court For the District of Utah

CENTRAL DIVISION

Filed August 27, 2004

No. 04-CV-256-DS

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of the Estate of Jeremy Ross Purcell, Deceased  
Plaintiff

v.

United States of America,  
Defendant,  
and  
John Does 1 through 100,  
Defendants.

JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury.  
The issues have been tried and the jury has rendered its  
verdict.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendants and  
plaintiff's cause of action is dismissed with prejudice.

October 20, 2004

Date

Markus B. Zimmer

Clerk